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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

JAMES A. POOLEY,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Mississippi

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INDEX

	Page
Introductory statement	1
Jurisdictional statement	2
Question presented for review	2
Constitutional provisions involved	2
Statement of the case	3
Reasons for granting the writ	8
Argument	9
Conclusion	18
Appendix A—Opinion of the Mississippi Supreme Court	A-1
Appendix B—Judgment of the Mississippi Supreme Court	A-6
Appendix C—Order denying petition for rehearing	A-7
Appendix D—Order allowing appellant to remain at large on bond	A-8

Cases Cited

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.ed 2d 723 (1964) 8, 10, 14

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.ed 2d 685 (1969) 8, 11, 12

District of Columbia v. Little, 339 U.S. 1, 70 S.Ct. 468, 94 L.ed 599 (1949) 13, 14

Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.ed 2d 327 (1959) 10, 11

Gouled v. United States, 225 U.S. 298, 41 S.Ct. 261, 65 L.ed 647 (1921) 17

Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.ed 2d 312 (1966) 8, 15, 16, 17, 18

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.ed 2d 1081 (1961) 9, 13

Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.ed 2d 246 (1964) 17

Pooley v. State, 257 So2d 212 (1972) 1, 17, 18

Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.ed 2d 637 (1969) 8, 14, 15

Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.ed 1663 (1948) 17

Statutes Cited

28 USC 1257(3) 2

United States Constitution:

Fourth amendment 2, 12, 13, 17

Fifth amendment 2, 3, 13, 17

Fourteenth amendment 2, 3, 12

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INTRODUCTORY STATEMENT

The Petitioner, James A. Pooley, respectfully petitions for a writ of certiorari to review a judgment and order made by the Supreme Court of the State of Mississippi unofficially reported as **Pooley v. State**, 257 So2d 212 (1972) affirming a judgment against the petitioner made and entered by the Circuit Court of Forrest County, Mississippi, on January 11, 1971.

The opinion of the Mississippi Supreme Court is appended, bound with this petition, and marked Appendix A.

The decision of the Mississippi Supreme Court was handed down on January 4, 1972. The judgment is appended, bound with the petition, and marked Exhibit B.

Petition for rehearing was denied on February 7, 1972. The judgment denying the petition for rehearing is appended, bound with this petition, and marked Exhibit C.

The defendant was permitted to remain at large on bond pending a determination of this petition. An order to that effect is appended, bound with this petition, and marked Exhibit D.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by Writ of Certiorari by virtue of 28 USC 1257 (3).

QUESTION PRESENTED FOR REVIEW

(1) Did the warrantless official intrusion of police officer Henry M. Bounds into the Petitioner's residence constitute a violation of Petitioner's Fourth Amendment and Fourteenth Amendment rights, and thereby render all evidence obtained as a result thereof inadmissible at Petitioner's trial?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fifth Amendments to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At the time of the incident giving rise to the arrest and ultimate conviction of defendant for the unlawful sale of marijuana, Petitioner was a college student at the Uni-

versity of Southern Mississippi, residing off campus in his private apartment. Petitioner was acquainted with one Richard Ferguson, who in turn knew one Howard Johnson and James Mims. The record does not indicate the extent of the relationship between Mims, Johnson, Ferguson and Petitioner. An alleged law enforcement officer from Purvis, Mississippi, Mr. Ray Chastagne, who did not testify, introduced Mims and Johnson to Detective Bobby E. Roberson of the Hattiesburg, Mississippi, Police Force.

The essential facts in reference to the search and seizure here reviewed are without dispute. On the afternoon of April 15, 1970, at approximately 5:30 P.M., Mims and Johnson met with Detective Roberson at the Hattiesburg, Mississippi, Police Station. The record is unclear, but these three individuals had met some time prior to April 15, 1970. After the police station conference, an appointment was made to meet again at the Nowhere Lounge with one Richard Ferguson, where Officer Bounds was to be introduced as a truck driver using a fictitious name.

Officer Bounds and Roberson did not know the Petitioner, nor were they acquainted with him. A plan of artifice was concocted at the 5:30 conference whereby Officer Bounds was to gain entrance to the Petitioner's private residence by the use of the Petitioner's friend, Ferguson, who preceded Bounds and was allowed entrance into the sanctity of Petitioner's home between 8:30 and 9:00 P.M. of the same evening.

Finally, at approximately 9:00 P.M., the two (2) informers, the police officer, and the unsuspecting mutual friend met at Petitioner's apartment.

As to the crucial and precise method of gaining entry, the record reflects the following:

"Q. When you got to the place that you say was Pooley's place, apartment number 1, what happened first? That is, how did you get in?

A. Well, we pulled up, we pulled in behind Richard. Richard got out and came back to the car, and said, you all wait here just a minute, and he went and knocked on the door up there.

Q. This is Ferguson?

A. Yeah.

Q. Excuse me, young man. I don't know whether (I) was clear or not. Is this a ground floor apartment or an upstairs apartment?

A. Ground floor.

Q. Ground floor. All right. Go ahead.

A. Richard motioned for us to come in, to come to the door, and Pooley invited us in, and we all went in, and he introduced Pooley to Bounds.

Q. Who introduced Pooley to Bounds?

A. Ferguson.

Q. All right, now the Pooley that you mentioned, did you know him by a first name?

A. All I knew was Pooley at first. And they said he was actually, or Richard said his name was James Pooley.

Q. All right. When Ferguson introduced Bounds to Pooley, with regard now, and I want you to please refer to that which pertains to the alleged sale of marijuana, was there any conversation, preliminary conversation there when you all got in the first room or living room, or whatever it was?

BY HON. ALVIN M. BINDER:

We object, Your Honor, on the same grounds and for the same reasons given heretofore on the Motion to Suppress and ask that you let us have a continuing objection for the record.

BY THE COURT:

Yes, let the objection be continuing.

Q. Did you all have, some, I believe somebody said rap or talk when you first went in the place after you howdy dood and somebody got introduced to somebody?

A. Well, I really can't remember, you know what I mean. We all went in and just all started talking, you know.

Q. What about Bounds being a truck driver? Do you recollect anything about that?

A. Yes, sir.

Q. What was said in Pooley's presence about Bounds being a truck driver?

A. Richard told Pooley, that he's the driver—the truck driver.

A. Let's see,——

Q. Take your time, son. I know you have never testified before.

A. Let's see. We went in and Ferguson introduced Bounds, and he said he was a truck driver, and that he was the one that he had talked about, you know, pills, you know, they was wanting to trade some pills for some marijuana, so we thought that we could, you know, talk about it and tell them that we knew a man, we didn't tell them for sure now, that we knew a fellow that handled pills from Baton Rouge, you know, in other words, to get somebody on the law enforcement in there with us that would know what was going on beside just us two. In other words, we had to have some help. That was the first case, you know, that I've ever been on, you know, to help out, and——" (R. 128-R. 130).

Entrance was obtained by Officer Bounds posing as a truck driver with the assistance of Ferguson and a conversation of some length took place before the officer observed the alleged contraband. Prior to and subsequent to gaining entrance to the apartment, Officer Bounds did

not reveal his identity as a police officer. He admitted that he did not arrest the Petitioner and testified that he gave marked bills to Johnson in an attempt to effectuate purchase of a small quantity of marijuana from the Petitioner and no contraband was ever offered for sale to Officer Bounds. Officer Bounds testified that after he gained entrance to Petitioner's apartment that the Petitioner did not discuss drugs initially. Officer Bounds admitted on the evening of April 15 and prior thereto he had no reason to believe that the Petitioner was engaged in the sale of narcotics. Then he changed his testimony and stated he suspected this at 7:00 that evening but didn't know witnesses Mims and Johnson before that evening. He stated he had no reason to get a search warrant prior to obtaining entrance. Arrest was not consummated on the scene, but was, in fact, not made until one month later on May 14, 1970.

Mims was the first State witness to admit that the entrance obtained by Ferguson was part of a plan by Bounds to obtain law enforcement entrance within the Petitioner's private residence by deception and artifice on the part of Officer Bounds.

The State then developed its proof that while acting under the subterfuge heretofore indicated, Officer Bounds obtained evidence that Petitioner gave Mr. Johnson a plastic bag obstensibly containing marijuana in consideration of Seventeen and no/100 Dollars ($17.00).

Over repeated defense objections, State's Exhibit No. 1 (contraband) was introduced into evidence, upon which the conviction of this Petitioner rests.

Prior to trial Petitioner filed his Motion to Suppress Evidence and during the trial interposed a continuing objection to the introduction of the marijuana into evidence stating as grounds for the motion and objections that the introduction of the marijuana into evidence would deny

Petitioner the rights guaranteed to him by the Fourth and Fifth Amendments to the Constitution of the United States as made applicable to the states by Section 1 of the Fourteenth Amendment, thus properly and timely raising and preserving his constitutional claims.

The Petitioner was convicted and sentenced to serve a term of five years in the Mississippi State Penitentiary and to pay a fine of $1,000.00. A motion for a new trial, raising Petitioner's Federal Constitutional claims, was filed and overruled. Petitioner appealed his conviction and sentence to the Mississippi Supreme Court renewing his Federal Constitutional claims. The conviction was affirmed by the Supreme Court of Mississippi and Petitioner's Petition for Rehearing Denied. Petitioner, having exhausted his state remedies, now petitions this Court for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

REASONS FOR GRANTING THE WRIT

a. The decision rendered by the Mississippi Supreme Court is in direct conflict with the decisions of this Court, particularly this Court's decisions in **Spinelli v. United States**, 393 U.S. 410, 89 S.Ct. 584, 21 L.ed 2d 637 (1969); **Chimel v. California**, 395 U.S. 752, 89 S.Ct. 2034, 23 L.ed 2d 685 (1969); **Aguilar v. Texas**, 378 U.S. 108, 84 S.Ct. 1509, 12 L.ed 2d 723 (1964); and **Lewis v. United States**, 385 U.S. 206, 87 S.Ct. 424, 17 L.ed 2d 312 (1966).

b. The Supreme Court of Mississippi decided the federal constitutional question here raised relying on its interpretation of this Court's decision in **Lewis v. United States**, 385 U.S. 206, 87 S.Ct. 424, 17 L.ed 2d 312 (1966). Petitioner raises here the issue that this Court's decision in **Lewis v. United States** is not decisive of the legal and factual circumstances and of the Federal questions in the case at bar.

ARGUMENT

Prior to the commencement of the trial, Petitioner made a proper motion to suppress the evidence obtained by Officer Bounds or any informer. The Court reserved its ruling on the motion pending the tender of proof by the State of its evidence. At the time of the State's initial tender of the evidence illegally obtained, the Petitioner made proper objection and moved that it be excluded. By the State's own admission, access was gained to the Petitioner's residence through artifice practiced by Police Officer Bounds under a fishing expedition scheme whereby a social acquaintance of Petitioner would be used as a vehicle to gain admittance by Officer Bounds falsely representing himself to be a truck driver. Notwithstanding proper motions and objections, Officer Bounds was permitted to testify as to the evidence discussed after gaining admittance in the manner indicated in the record.

Mr. Howard Johnson was next presented as a witness by the State to testify as to information obtained while within the Petitioner's residence under the misrepresentations aforesaid and was permitted to do so over proper objection and motion to suppress by the Petitioner.

Next, Mr. James Mims, the other alleged informer, was permitted to likewise testify as to occurrences within the Petitioner's domicile. Petitioner likewise preserved his objections and motions as to said testimony.

Petitioner contends that the evidence obtained and introduced by the State was a result and fruit of an illegal search and seizure. Repeatedly, the record indicates that the search was not made pursuant to any warrant or arrest of the accused, but solely on the purported consent of the accused.

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.ed. 2d 1081 (1961), is the first case which required all states to

exclude evidence discovered during an unlawful search. The search here also was without search warrant; however, there was forcible entry.

In **Aguilar v. Texas**, 378 U.S. 108, 845 S.Ct. 1509, 12 L.ed. 2d 723 (1964), this Court held that fruits of Fourth Amendment violations should be excluded and the police officers intent is examined as to whether or not his conduct is offensive to the Constitution, and as in the case at bar as to whether or not he could have achieved his goal lawfully.

The "Probable Cause Doctrine" was established in 1959 with the advent of **Draper v. United States**, 358 U.S. 307, 79 S.Ct. 329, 3 L.ed. 2d 327 (1959) holding that where officers had probable cause to arrest without warrant, search incident to arrest was lawful. In the **Draper** case the police were informed that he was a narcotics peddler and unlike the case at bar, the authorities established that they had reason to rely on their informers. The **Draper** case held that:

> "Probable cause exists where the facts and circumstances within their (Police) knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Here officers Bounds and Roberson did not know the defendant prior to April 15, 1970, and had no previous relations whatsoever with witnesses Mims and Johnson. Roberson was introduced to Mims and Johnson prior to April 15, 1970, by a law enforcement officer of another county who never testified in the trial as to the reliability of Mims and Johnson.

The **Draper** case established that if a police officer, such as Bounds and Roberson, took the law into their own hands then they must act on some evidence known to

them for the law initally protects the citizen and mere suspicious acts, even when observed by an officer, might be as consistent with innocence as with guilt. The case holds that officers acting with "probable cause" or on "reasonable grounds" are protected. The law officers here had nothing except an accusation of mere suspicion on the part of the unknown alleged informers Mims and Johnson. Bounds didn't expect to make an arrest and in fact did not and relied on the mere words of unproved informers who had related mere suspicious possibilities. There were no facts legally sufficient to present to a magistrate for the officers could only swear to the fact that their informers Mims and Johnson had made an accusation and certainly there was no evidence as in **Draper** that lay in Bounds and Roberson's knowledge that could be disclosed to a magistrate to obtain a warrant.

The scope of the search is further important in the case at bar. Once Officer Bounds had obtained entrance to the living room of the defendant without probable cause an issue is presented as to whether or not he had a further right to gain entrance by subterfuge to the defendant's bedroom. This Court, in **Chimel v. California,** 395 U.S. 752, 89 S.Ct. 2034, 23 L.ed. 2d 685 (1969), limited the search where there was no Constitutional justification without a search warrant to extend a search beyond a Petitioner's person or the immediate surrounding area of the Petitioner. In **Chimel,** supra, as in the case at bar, the officer had sufficient time to obtain a search warrant and failed to do so. **Chimel,** supra, confines a search to the immediate vicinity of the arrest and further holds that belief even well founded that contraband is concealed in a dwelling house furnished no justification for arrest or search without warrant. Under this Court's holding in **Chimel,** supra, the State had to prove an exceptional situation with no time to obtain the warrant. In the case at bar, it is clear that the officers were on a fishing expedi-

tion—had sufficient time to get a warrant— had no reliable information and facts to depend on, but knew the address of Petitioner where he was actually found. The State failed to show any facts as to why it was impracticable for them to obtain a search warrant and the law in **Chimel** protects Petitioner once again.

Petitioner contends that the burden was upon the prosecution to establish voluntary consent to the entrance into his abode by the agencies of the State for the purpose of obtaining evidence with which to prosecute him for the illegal sale of marijuana. The Mississippi Supreme Court, relying on post entrance activities, held that Petitioner had consented to the State's unconstitutional infringement into Petitioner's home and in so doing passed on the constitutional claims Petitioner raises here.

Since entry into Petitioner's place of residence was gained through artifice, misrepresentation, and subterfuge, the evidence thereby obtained is inadmissible. The question next arises as to the extent of the applicability of our exclusionary rule precluding the introduction of evidence illegally obtained. Petitioner contends that not only was the substance alleged to be marijuana which was procured by the illegal entry inadmissible, but all other evidence, oral or documentary, should be excluded.

We thus come to the heart of the issue as to whether the right of search and seizure was available to the Hattiesburg law enforcement authorities without warrant and was the inevitable taking into custody of Petitioner's property a violation of the Fourth Amendment and Fourteenth Amendment of the United States Constitution. Search warrants were not known to common law and we first turn to the Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no

warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The fundamental law of the Fourth Amendment makes a man's home truly his castle and guaranteed a limitation of powers upon the Federal Government which only disappeared with the advent of **Mapp v. Ohio**, supra. We next are confronted with the basic law that belief, no matter how well founded by a police officer that an article sought is concealed in a residence, does not justify search without warrant. A mere suspicion without reasonable grounds for believing the suspicion to be founded in fact will not amount to probable cause. Petitioner did not voluntarily permit or expressly invite and agree to the police officer's search while being cognizant of his rights in the premises. Mere acquiescence, even in the presence of a search warrant, does not imply voluntary consent, and we do not have these facts in the case at bar. The enigma of the law is that the constitutional guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. The Courts have held that the reasonableness of a search without a warrant should be adjudicated solely by the extremity of the circumstances of the moment and not be any general characteristic of the officer or his mission. See **District of Columbia v. Little**, 339 U.S. 1, 70 S.Ct. 468, 94 L.ed. 599 (1949). It is well settled that the law of search and seizure under the Fourth and Fifth Amendments to the Federal Constitution reflects the dual purpose of (1) protecting the privacy of the individual (his rights to be left alone) and (2) protection of the individual against compulsory production of evidence to be used against him. The principal object of the Fourth Amendment is protection of privacy rather than property and this Court has discarded fictional and procedural barriers resting on property concepts. The protection of the Fourth

Amendment is not only limited to the tangible evidence but has extended to oral testimony. The cases all seem to agree in the modern day time since 1960 that even if the evidence and facts constitute justification of the issuance of a search warrant where there is no reason offered for not obtaining a search warrant except inconvenience to officers or slight delay and where there was no suspect fleeing or likely to take flight and where there was no evidence, factual or otherwise, that contraband in fact would be found on the premises and there was an accomplished search of private premises then such evidence should be inadmissible. In the **Little** case, supra, the Court went further and held that except in most urgent of necessities, all questions of the reasonableness of the search is for the Magistrate and not for law enforcement officers. Obtaining entrance through the use of the Petitioner's friend, Ferguson, and by the use of subterfuge makes the private individual nonetheless an arm of law enforcement. Ferguson, Mims and Johnson procured the entry surely as an agent of a police officer employing trickery and the exclusionary rule concerning the evidence and testimony obtained is applicable. When Mims and Johnson did what the officers asked them to do, this type conduct is specifically not consonant with the purpose for which the Petitioner had given them authority to enter and any conclusions that they did not act as an arm of the police is simply unrealistic.

The **Spinelli** and **Aguilar** cases cited above make it mandatory that the State show how the informer learned that Pooley was suspect, or evidence and facts should be brought from the witness stand in favor of the State to show how the informer established to the satisfaction of the police that Pooley took an apartment for illegal purposes. The facts show that the informers and Police Officer Bounds followed Ferguson in a second car to the defendant's house. In the absence of a statement dealing with the manner in which the information was obtained,

it was mandatory for the prosecution to establish that the tip described the accused's criminal activity in such sufficient detail that a Magistrate might know that he was relying on some substantial accusation based on reliable facts. In short, even if Petitioner had a former criminal record this would be of no consequence and is not a factor that could be considered in a decision as to whether probable cause existed. Also in **Spinelli**, we point out that even though the FBI agent observed Spinelli on ten saparate occasions and a supposedly reliable informant gave a tip to the FBI that Spinelli was operating as a bookmaker, this Court held the affidavit bad.

The reasonableness of the search of Officer Bounds where we have a warantless search is measured from the standpoint of the searcher's conduct. If Officer Bounds' conduct is in some way reprehensible or if he participated in the search and was motivated by a desire to "hunt" for incriminating evidence and he did so without any plausible explanation or justification, then such an invasion is unreasonable. Petitioner here submits the police officers violated Pooley's constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States which guarantees that citizens shall be secure from unreasonable searches and seizures.

In ruling on Petitioner's contention that Officer Bounds violated Petitioner's rights under the United States Constitution when he intruded into Appellant's apartment without a search warrant based upon probable cause the Supreme Court of Mississippi relying on **Lewis v. United States**, 385 U.S. 206, 87 S. Ct. 424, 17 L.ed 2d 321 (1966), per Justice R. P. Sugg held:

> "Under the particular circumstances of this case, we hold that the evidence of sale is admissible and although the undercover agent did not appear at the apartment of appellant in response to a specific invitation, his willingness to sell marijuana to strangers

> after admitting them voluntarily to his apartment constituted a waiver of official intrusion upon the privacy of his apartment."

Petitioner submits that the holding in **Lewis**, supra, is not controlling here. In **Lewis**, a federal narcotics agent, on two separate invitations from Lewis to come to Lewis' home for the specific purpose of purchasing marijuana, entered Lewis' home and purchased marijuana. This Court there rejected the Petitioner's contention:

> ". . . that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception." 385 U.S. at 208.

holding that:

> ". . . when, as here, the home is converted into a commercial center to which outsiders are invited for the purpose of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or in the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." 385 U.S. at 211.

The record in the case at bar establishes (1) that Officer Bounds did not have prior factual and reliable information that Petitioner possessed or would sell drugs; (2) that Officer Bounds did not receive an invitation to Appellant's apartment for the purpose of purchasing contraband; and (3) that Officer Bounds did not gain entrance to and intrude upon the privacy of Petitioner's home at a time when both he and Petitioner agreed that the purpose of the meeting was the purchase and sale of contraband. The uncontradicted facts revealed in the

record preclude the application of the ruling in **Lewis**, supra, to the case under review.

Here, Officer Bounds' official intrusion by deceit and artifice into Petitioner's home constitutes a violation of Petitioner's rights under the Constitution of the United States. **Massiah v. United States**, 377 U.S. 201, 84 S.Ct. 1199, 12 L.ed 2d 246 (1964), **Trupiano v. United States**, 334 U.S. 699, 68 S.Ct. 1229, 92 L.ed 1663 (1948) and **Gouled v. United States**, 225 U.S. 298, 41 S.Ct. 261, 65 L.ed 647 (1921).

Petitioner does not quarrel with the **Lewis** holding, but merely asserts that this holding does not extend in any manner to the factual situation at bar. The Fourth and Fifth Amendments create those protective rights which are not pierced in the **Pooley** case by this Court's holding in **Lewis**. Should the ruling in the **Pooley** case stand affirmed, the law surrounding search warrants would be negated and we would enter an era of complete "warrantless" searches and seizures.

In **Lewis**, government agents knew that the defendant was a seller of drugs and the agent had a specific invitation to come to the defendant's residence for the purpose of sale. The invitation for a proposed sale in itself was an expressed intention to commit a felony.

Here, no crime had yet been committed prior to entrance and Officer Bounds did not possess information of illegal conduct on the part of Pooley. Further, there was no solicitation either by the Officer or by Pooley that would encourage such a confrontation to effect the sale of contraband. Petitioner maintains that if an agent of the government can obtain entrance by stealth or artifice for a mere "fishing expedition" without any more factual or reliable information than Bounds or his superiors had in the case at bar, everyone would be subject to search and seizure by any governmental agency under the guise of the deliverers of laundry or groceries, etc. In **Lewis**, the agent had rea-

son to believe that the petitioner possessed narcotics when the petitioner, prior to entrance, offered same for sale to the agent. The Supreme Court of Mississippi placed his home in the arena of a public business house by his willingness to sell contraband. We are then confronted with the issue as to whether this Court in **Lewis** intended to infer that under the facts in the **Pooley** case the constitutional rights of Pooley were waived by his conduct? Pursuant to the holding in **Pooley**, the State could by artifice and stratagem, without prior notice from any reliable source, enter any person's home and failing resistance or objection by virtue of the artifice the entrance will be called "invitation" with all evidence obtained by the "fishing expedition" submitted at trial as admissible by waiver. Petitioner does not believe that this Court intends to do away with search warrants and approve warrantless searches except in those areas heretofore delineated by this Court and Petitioner therefore respectfully petitions this Court for a Writ of Certiorari to the Supreme Court of Mississippi to review that Court's decision in **Pooley v. State.**

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for a writ of certiorari should be granted, and that the judgment of the Mississippi Supreme Court affirming the judgment of the Circuit Court of Forrest County, Mississippi, should be set aside, and the judgment of conviction reversed.

Respectfully submitted

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Counsel for Petitioner

APPENDIX A

In the Supreme Court of Mississippi

James A. Pooley,
v.
State of Mississippi. } No. 46,565.

Sugg, Justice:

Appellant was convicted in the Circuit Court of Forrest County of the sale of marijuana and sentenced to serve five years in the penitentiary and to pay a fine of $1,000.00.

Sergeant Henry M. Bounds of the Hattiesburg Police Department accompanied three men to the apartment of appellant. Two of the men had volunteered their services without remuneration as private citizens to secure evidence against persons suspected of possessing or selling narcotics and knew that Sergeant Bounds was a police officer. The other man did not know that he was a police officer and did not know that the other two men were present for the purpose indicated above.

Upon arrival at the apartment of appellant, the four men were invited in and after a preliminary conversation the appellant stated that he was in the business to make a profit and invited them into a backroom for the purpose of making a sale of marijuana. Appellant showed them four bags of marijuana and sold one of the men who accompanied the police officer a lid[1] of marijuana for $18.00. The police officer provided $7.00 of the purchase price at the time of the sale.

---

[1] A lid of marijuana was defined in the evidence as being approximately 20 grams of marijuana.

Appellant argues that the police officer needed a search warrant based on probable cause to enter his apartment; however, in **Lewis v. United States**, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966), the Supreme Court of the United States held that where an undercover agent was invited into a home for the purpose of purchasing marijuana, defendant lost his protection and his home was treated as a business.

In **Lewis** the Court stated:

> Petitioner does not argue that he was entrapped, as he could not on the facts of this case; nor does he contend that a search of his home was made or that anything other than the purchased narcotics was taken away. His only contentions are that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and that the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception.
>
> Both petitioner and the Government recognize the necessity for some undercover police activity and both concede that the particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception. Indeed, it has long been acknowledged by the decisions of this Court, see **Grimm v. United States**, 156 U.S. 604, 610 (1895), and **Andrews v. United States**, 162 U.S. 420, 423 (1896), that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents. The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual. See, *e.g.*, **Massiah v. United States**, 377 U.S. 201 (1964); **Trupiano v. United States**, 334 U.S. 699 (1948) (U.S. at 208, 209, S.Ct. at 426, L. Ed. 2d at 314-315).

As stated in **Lewis**, *supra*, particular circumstances of each case govern the admissibility of evidence obtained by deception and in the case at bar appellant invited in, and conversed with, the four persons he had admitted to his apartment. When advised by the only one of the four persons with whom he was acquainted that they had come to buy some grass (a slang term for marijuana), he accompanied his four visitors into a backroom, and after some discussion of the price of a lid of marijuana, agreed to reduce the price from $20.00 to $18.00. Under the particular circumstances of this case, we hold that the evidence of the sale is admissible and although the undercover agent and the three persons accompanying him did not appear at the apartment of appellant in response to a specific invitation, his willingness to sell marijuana to strangers after admitting them voluntarily to his apartment constituted a waiver of official intrusion upon the privacy of his apartment.

The police officer and the two private citizens who accompanied him to appellant's apartment did not see, hear, or take anything that was not contemplated as a necessary part of his illegal business of selling marijuana, and to hold that the deception of the police officer in this case is constitutionally prohibited, would announce a rule that the use of undercover agents in any manner is virtually unconstitutional per se.

The cooperation of interested citizens who are willing to give of their time assisting officers in purchasing narcotics for the purpose of providing evidence should not be condemned, and officers should not have this means of obtaining evidence taken away from them because such a rule would seriously hamper officers in obtaining evidence from criminal activities which are carried on secretly.

Appellant also argues that the trial court erred when it did not grant him a continuance to permit him to have

a sample of the marijuana analyzed. On January 11, 1971 the case was called for trial, after having been previously set for trial, and counsel for the appellant moved for a continuance on the grounds that on January 6, 1971, he became aware of the decision of **Jackson v. State**, 243 So.2d 396 (Miss. 1970) and filed a motion for discovery on the afternoon of the 6th requesting a sample of the marijuana for the purpose of having a chemical analysis made of it by a chemist of appellant's own choosing. On January 8, 1971, at a hearing on the motion, the district attorney admitted that the appellant was entitled to a sample and tendered to counsel for the appellant a sample of the marijuana so that appellant could have a chemical analysis made and the case could be tried on the following Monday, January 11, 1971. Counsel for appellant argued that there was not sufficient time to have the chemical analysis made, but the proof showed that the test is relatively simple and could be made within a matter of 15 or 20 minutes by a qualified chemist.

In the case of **Armstrong v. State**, 214 So.2d 589 (Miss. 1968), we held that the defendant should be permitted to inspect tangible evidence which might be used against him or which might be useful in his defense. Appellant had ample time in which to familiarize himself with his rights to inspection of tangible evidence before the case was set for trial on January 11, 1971 and the trial court did not abuse its discretion in denying the motion for a continuance.

At the trial the substance was positively identified by Stanley Schreiver, a qualified chemist with the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice. The substance was marijuana beyond any question.

Since this case was tried, the Legislature has enacted the Uniform Controlled Substances Act which materially

reduces the penalty that may be imposed for first offenders. In **Smith v. State**, 248 So.2d 436 (Miss: 1971), we stated at page 439 as follows:

> [W]e deem it proper and in keeping with the intention of the Legislature that his conviction be affirmed, but that the case be remanded to the trial court for an imposition of a sentence in accordance with the provisions of the Uniform Controlled Substances Act.

For the reasons stated, we affirm appellant's conviction, but the sentence heretofore imposed is set aside, and the case is remanded to the trial court for the imposition of such sentence as the trial court may deem appropriate under the provisions of the Uniform Controlled Substances Act.

Affirmed and Remanded.

Gillespie, C. J. and Brady, Patterson and Smith, J. J., Concur.

APPENDIX B

In the Supreme Court of Mississippi

January 4, 1972, Court Sitting : : : : : :

James A. "Gus" Pooley

46 565 vs.

State.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Forrest County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 29th day of January, 1971—be and the same is hereby affirmed but the sentence heretofore imposed is set aside, and the case is remanded to the trial court for the imposition of such sentence as the trial court may deem appropriate under the provisions of the Uniform Controlled Substances Act. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant and Seymour Pooley, Mary Gertrude Pooley and Seymour Pooley, Jr., sureties on the appeal bond herein, all of the costs of this appeal to be taxed for which let proper process issue.

Minute Book "BP", page 478.

APPENDIX C

In the Supreme Court of Mississippi

February 7, 1972

James A. Pooley

46 565 vs.

State

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that petition be and the same is hereby denied.

Minute Book "BP", page 502

APPENDIX D

James A. Pooley

46 565 vs.

State

Ordered: That the Appellant's application for stay of mandate and enforcement of the judgment is sustained provided that a petition for writ of certiorari to the Supreme Court of the United States is filed within time provided by the rules of the Supreme Court of the United States, and Ordered that Appellant is granted bail pending filing of and determination on his petition for writ of certiorari to the United States Supreme Court on filing bond in the sum of $7,500.00, said bond to be with good and sufficient sureties and to be approved by the Circuit Clerk of Forrest County, Mississippi. Ordered this the 7th day of February, 1972.

/s/ ROBERT G. GILLESPIE
ROBERT G. GILLESPIE
Chief Justice

Minute Book "BP", page 502

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Supreme Court, U. S.
FILED
JUL 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1383

JAMES A. POOLEY,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR REHEARING

ALVIN M. BINDER
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INDEX

Page

Petition for Rehearing 1

Conclusion 6

Exhibit A—Miss. Code 1942, as amended, Sections 6381-01-51-52-56-57-70-74-83-87-88 ..... A-1

Exhibit B—Miss. Code 1942, as amended, Section 6370 ..... A-14

Cases Cited

Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 4

Johnson v. State of Mississippi, 260 So.2d 436 3

Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 69 L. Ed. 905 (1915) 4

Statutes Cited

Miss. Code of 1942, as amended, Section 6831-70 ..... 3, 4

Miss. Code of 1942, as amended, Section 6846 ..... 2, 3

Miss. Code of 1942, as amended, Section 6866 2

Miss. Code of 1942, as amended, Sections 6381-01, 51-52-56-57-70-74-83-87-88 ..... 2, 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1383

JAMES A. POOLEY,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered on June 26, 1972, and (2) granting the Petition for Certiorari. As grounds for this motion, Petitioner states the following:

(1) Intervening circumstances of substantial and controlling effect, including substantial grounds heretofore not previously presented, have occurred by way of the enactment by the Legislature of the State of Mississippi of new legislation directly affecting your Petitioner.

Petifioner was arrested, tried and convicted under the provisions of Section 6846, **Miss. Code of 1942**, as amended, for the sale of marijuana, which section provides:

> "It shall be unlawful for any person to manufacture, possess, have under his or her control, sell, prescribe, administer, dispense, or compound any narcotic drug except as authorized in this Act."

Pursuant to his conviction, Petitioner was sentenced to a term of five (5) years in the Mississippi State Penitentiary and to pay a fine of One Thousand Dollars ($1,000.00). This sentence was meted out pursuant to the provisions of Section 6866, **Miss. Code of 1942**, as amended, which section provides:

> "Any person violating any provision of this Act shall be deemed guilty of a felony and upon conviction be punished for the first offense by a fine not exceeding five thousand dollars ($5,000.00) or by imprisonment in the State penitentiary for not exceeding five (5) years or by both such fine and imprisonment, and for any subsequent offense, by a fine not exceeding ten thousand ($10,000.00) dollars, or by imprisonment in the State penitentiary for not exceeding ten (10) years, or by both such fine and imprisonment."

By Laws, 1971, Chapter 521, Section 38, effective from and after April 16, 1971, the Mississippi Legislature repealed Sections 6846 and 6866, supra, and enacted the Uniform Controlled Substances Act, **Miss. Code of 1942**, as amended, Sections 6381-01-51-52-56-57-70-74-83-87-88 (appended and bound with this Petition and marked Exhibit "A"). By its decision and order of January 4, 1972, the Supreme Court of Mississippi, apparently recognizing the possibility of probation or suspended sentence under Section 6831-74 stated in its opinion:

> "Since this case was tried, the Legislature has enacted the Uniform Controlled Substances Act which

materially reduces the penalty that may be imposed for first offenders."

and vacated Petitioner's sentence and directed that the case be remanded to the trial court

". . . for the imposition of such sentence as the trial court may deem appropriate under the provisions of the Uniform Controlled Substances Act."

In the course of these proceedings in this Honorable Court, the Mississippi Legislature, spurred to action by decisions of the Mississippi Supreme Court amended the Uniform Controlled Substances Act in several particulars. The decisions of the Mississippi Supreme Court reveal that the Mississippi Legislature in the enactment of the Uniform Controlled Substances Act, **Miss. Code of 1942**, as amended, Sections 6831-01-88, provided that possession of the drug marijuana was in one instance a felony and in another instance a misdemeanor with two distinct penalties for the same offense. See **Harold Wayne Johnson v. State of Mississippi**, 260 So.2d 436 (1972). Obviously said Act further, unlike the provisions in Section 6846, **Miss. Code of 1942**, supra, did not provide a section covering the words "sale of drugs". The second enactment of the Uniform Controlled Substances Act, **Miss. Code of 1942**, particularly Section 6831-70(c), (Exhibit "B" to this Petition) specifically made such a provision by making it

". . . unlawful for any person to sell, barter or transfer a controlled or counterfeit substance for money or for other consideration."

and establishing the penalty for such crime as imprisonment for not more than thirty (30) years, or fine of not more than Thirty Thousand Dollars ($30,000.00), or both, Section 6831-70, **Miss. Code of 1942**, as amended, by laws 1972, Senate Bill 1609, effective from and after July 1, 1972. The statute effective July 1, 1972, is appended, bound with this Petition and marked Exhibit "B".

By this Petition for Rehearing, Petitioner submits:

(1) That the statutes in force at the time of Petitioner's alleged criminal conduct, Sections 6846 and 6866, supra, were repealed by the Uniform Controlled Substances Act, Sections 6831-01-88, supra (April 16, 1971—see pertinent sections Exhibit "A"), and that this Uniform Controlled Substances Act (1971) repealed the crime of which Petitioner stands convicted.

(2) That the Mississippi Supreme Court has, in the instant case by decision of January 4, 1972, applied the Uniform Controlled Substances Act (1971—Exhibit "A") to the case at bar and that said statute is, by subjecting Petitioner to an increase of sentence and punishment, to a maximum of six (6) years imprisonment, Two Thousand Dollars ($2,000.00) fine, or both, ex post facto and subject to the prohibition of Art. 1, Sections 9 and 10 of the Federal Constitution. **Calder v. Bull**, 3 Dall. 386, 1 L. Ed. 648; **Malloy v. South Carolina**, 237 U.S. 180, 35 S. Ct. 507, 69 L. Ed. 905 (1915).

(3) That the Uniform Controlled Substances Act (1971—Exhibit "A") contains no provision making it unlawful for any person "to sell, barter or transfer" a controlled substance for money or other consideration as the previous Section 6846, supra. Thus, with the repeal of Section 6846, supra, the crime of selling marijuana ceased to exist under the laws of the State of Mississippi. Review of the pertinent statutes effective July 1, 1972 (Exhibit "B"), particularly Section 6831-70, supra, as amended, reveals that the Mississippi Legislature recognized this oversight when it specifically enacted Section 6831-70(c) which provides:

> "(c) Except as authorized by this act, it is unlawful for any person to sell, barter or transfer a controlled or counterfeit substance for money or for other consideration.

"Any person who violates this subsection with respect to:

"(1) A controlled substance classified in Schedule I or II, as set out in Sections 6831-57 and 6831-58, Mississippi Code of 1942, which is a narcotic drug, is guilty of a felony and upon conviction may be imprisoned for not more than thirty (30) years, or fined not more than Thirty Thousand Dollars ($30,000.00), or both;"

Recognizing the history of the drug laws in Mississippi and the current statutes, Petitioner respectfully submits that he cannot be sentenced under the Uniform Controlled Substances Act, as originally enacted (1971) or as amended (1972) even if it is held that the conviction is proper.

Although the Uniform Controlled Substances Act provides in Section 6831-83 that prosecutions for violations of law prior to April 16, 1971, are not to be affected or abated by the Uniform Act this same section specifically provides that the penalty for such violation shall be prescribed by the Uniform Act.

Petitioner does not contend that the Uniform Controlled Substances Act as originally enacted or as amended is in toto ineffectual or unenforceable as to crimes committed from and after the Act and amendments thereto. However, Petitioner urges insofar as this legislation purports to have a bearing on his conviction and sentence, the instant the penalties provided at the time of the commission of the criminal act were abolished and new and greater penalties provided, the application of same was ex post facto. Petitioner asserts that the Mississippi Uniform Controlled Substances Act of 1971 (Exhibit "A") as amended 1972 (Exhibit "B"), does not apply to Petitioner as the former contains no provision for the offense charged and thus fails to state a penalty appropriate for the Petitioner and as for the latter, once again in a short

period of time the State Legislature has increased the penalties and provided for the Petitioner's original charge with both acts emphatically ex post facto and thus cannot be applied to Petitioner as he is protected both by the State and Federal Constitutional provisions prohibiting State and Federal governments from enacting ex post facto laws.

CONCLUSION

For the foregoing reasons, as well as those grounds set forth in the Petition for Writ of Certiorari, Petitioner prays that this Court grant a rehearing of its order of denial of certiorari, vacate the order, grant the Petition and review the judgment and opinion of the Supreme Court of the State of Mississippi in this cause.

Respectfully submitted

ALVIN M. BINDER
511 East Pearl Street
P. O. Box 25
Jackson, Mississippi 39205
Counsel for Petitioner

Certificate of Counsel

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay and that same is restricted to the grounds specified in Rule 58(2) of this Court.

ALVIN M. BINDER
511 East Pearl Street
P. O. Box 25
Jackson, Mississippi
Counsel for Petitioner

Certificate of Service

I hereby certify that on this the 14 day of July, A.D., 1972, three true copies of the above and foregoing Petition for Rehearing were mailed United States Postage prepaid, to Honorable A. F. Summer, Attorney General, State of Mississippi, New Capitol Building, Jackson, Mississippi 39201, Counsel for Respondent. I further certify that all parties required to be served have been served.

ALVIN M. BINDER
511 East Pearl Street
P. O. Box 25
Jackson, Mississippi 39205
Counsel for Petitioner

APPENDIX

EXHIBIT "A"

§§ 6831-01 through 6831-11. Repealed by § 38 of ch. 521, Laws, 1971, eff from and after passage (approved April 16, 1971).

§ 6831-51. Title.

This act is to be known as the Uniform Controlled Substances Act.

Sources: Laws, 1971, ch. 521, § 1, eff from and after passage (approved April 16, 1971).

§ 6831-52. Purpose.

The purpose of this act is to make uniform the law of Mississippi, wherever possible, with respect to this subject among those states with the same or similar laws.

Sources: Laws, 1971, ch. 521, § 2, eff from and after passage (approved April 16, 1971).

§ 6831-56. Definitions.

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(1) A practitioner (or, in his presence, by his authorized agent), or

(2) The patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manfacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman.

(c) "Board" means the Mississippi State Board of Health.

(d) "Bureau" means the Mississippi Bureau of Drug Enforcement within the Mississippi State Board of Health.

(e) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of Sections 7, 8, 9, 10, and 11 [§§ 6831-57 through 6831-61].

(f) "Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

(g) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship.

(h) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(i) "Dispenser" means a practitioner who dispenses.

(j) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(k) "Distributor" means a person who distributes.

(l) "Drug" means (1) substances recognized as drugs in the official United States Pharmacopocia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (2) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man

or animals; (3) substances (other than food) intended to affect the structure or any function of the body of man or animals; and (4) substances intended for use as a component of any article specified in this paragraph. It does not include devices or their components, parts, or accessories.

(m) "Immediate precursor" means a substance which the State Board of Pharmacy has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

(n) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

(2) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

(o) "Marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the

resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seed or resin.

(p) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause 1, but not including the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(q) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or a addiction-sustaining liability. It does not include, unless specifically designated as controlled under Section 201 of this act, the dextrorotatory isomer of a 3-methoxy-n-methylmorphinian and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

(r) "Opium poppy" means the plant of the species Papaver comniferum L., except its seeds.

(s) "Paraphernalia" means needles, spoons, pipes, capsules, syringes, tourniquets, any form of packaging, or any other material used for taking or administering drugs.

(t) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate trust, partnership or association, or any other legal entity.

(u) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(v) "Practitioner" means:

(1) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

(2) A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

(w) "Production" includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance.

(x) "State," when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America.

(y) "Ultimate user" means a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of this household.

Sources: Laws, 1971, ch. 521, § 6, eff from and after passage (approved April 16, 1971).

§ 6831-57. Schedule I of controlled substances.

The Board shall place a substance in Schedule I of this section if it finds that the substance:

(1) Has high potential for abuse; and

(2) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

(a) The controlled substances listed in this section are included in Schedule 1.

SCHEDULE I

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetylmethodol;
(2) Allylprodine;
(3) Alphacetylmethadol;
(4) Alphameprodine;
(5) Alphamethodol;
(6) Benzethidine;
(7) Betacetylmethadol;
(8) Betameprodine;
(9) Betamethadol;
(10) Betaprodine;
(11) Clonitazene;
(12) Dextromoramide;
(13) Dextrorphan;
(14) Diampromide;
(15) Diethylthiambutene;
(16) Dimenoxadol;
(17) Dimepheptanol;
(18) Dimethylthiambutene;
(19) Dioxaphetyl butyrate;
(20) Dipipanone;
(21) Ethylmethylthiambutene;
(22) Etonitazene;
(23) Etoxeridine;
(24) Furethidine;
(25) Hydroxypethidine;
(26) Ketobemidone;
(27) Levomoramide;
(28) Levophenacylmorphan;
(29) Morpheridine;
(30) Noracymethadol;
(31) Norlevorphanol;
(32) Normethadone;
(33) Norpipanone;
(34) Phenadoxone;
(35) Phenampromide;
(36) Phenomorphan;
(37) Phenoperidine;
(38) Piritramide;
(39) Proheptazine;
(40) Properidine;
(41) Racemoramide;
(42) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;
(2) Acetyldihydrocodeine;
(3) Benzylmorphine;
(4) Codeine methylbromide;
(5) Codeine-N-Oxide;
(6) Cyprenorphine;
(7) Desomorphine;
(8) Dihydromorphine;
(9) Etorphine;
(10) Heroin;
(11) Hydromorphinol;
(12) Methyldesorphine;
(13) Methyldihydromorphine;
(14) Morphine methylbromide;
(15) Morphine methylsulfonate;
(16) Morphine-N-Oxide;
(17) Myrophine;
(18) Nicocodeine;
(19) Nicomorphine;
(20) Normorphine;
(21) Phoclodine;
(22) Thebacon.

Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is posssible within the specific chemical designation:

(1) 3, 4-methylenedioxy amphetamine;
(2) 5-methoxy-3, 4-methylenedioxy amphetamine;
(3) 3, 4, 5-trimethoxy amphetamine;
(4) Bufotenine;
(5) Diethyltryptamine;
(6) Dimethyltryptamine;
(7) 4-methyl-2, 5-dimethoxylam-amphetamine;
(8) Ibogaine;
(9) Lysergic acid diethylamide; (LSD)
(10) Marihuana;
(11) Mescaline;
(12) Peyote;
(13) N-ethyl-3-piperidyl benzilate;
(14) N-methyl-3-piperidyl benzilate;
(15) Psilocybin;
(16) Psilocyn;
(17) Tetrahydrocannabinols.

§ 6831-70. Prohibited acts A—penalties.

(a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess a controlled substance.

Any person who violates this subsection with respect to:

(1) A controlled substance classified in Schedule I or II, as set out in Sections 7 and 8 [§§ 6831-57 and 6831-58] of this act, which is a narcotic drug, is guilty of a felony and upon conviction may be imprisoned for not more than six (6) years, or fined not more than Two Thousand Dollars ($2,000.00), or both;

(2) Any other controlled substance classified in Schedule I, II, or III, as set out in Sections 7, 8, and 9 [§§ 6831-57 through 6831-59] of this act, is guilty of a felony and upon conviction may be imprisoned for not more than four (4) years, or fined not more than Two Thousand Dollars ($2,000.00), or both;

(3) A substance classified in Schedule IV, as set out in Section 10 [§ 6831-60] of this act, is guilty of a felony and upon conviction may be imprisoned for not more than two (2) years, or fined not more than One Thousand Dollars ($1,000.00), or both;

(4) A substance classified in Schedule V, as set out in Section 11 [§ 6831-61] of this act, is guilty of a misdemeanor and upon conviction may be confined for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

(b) Except as authorized by this act, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

Any person who violates this subsection with respect to:

(1) A counterfeit substance classified in the said Schedule I or II which is a narcotic drug, is guilty of a felony and upon conviction may be imprisoned for not more than six (6) years, or fined not more than Two Thousand Dollars ($2,000.00), or both;

(2) Any other counterfeit substance classified in Schedule I, II, or III, as defined in Sections 7, 8 and 9 [§§ 6831-57 through 6831-59] of this act, is guilty of a felony and upon conviction may be imprisoned for not more than four (4) years, or fined not more than One Thousand Dollars ($1,000.00), or both.

(3) A counterfeit substance classified in Schedule IV, as defined in Section 10 [§ 6831-60] of this act, is guilty of a felony and upon conviction may be imprisoned for not more than two (2) years, or fined not more than One Thousand Dollars ($1,000.00), or both;

(4) A counterfeit substance classified in Schedule V, as defined in Section 11 [§ 6831-61] of this act, is guilty of a misdemeanor and upon conviction may be confined for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

(c) It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this subsection is guilty of a misdemeanor and upon conviction, may be confined for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

(d) It is unlawful for a person who is not authorized by the State Board of Health or other lawful or proper authority to possess paraphernalia to be used for the purpose of taking or administering a controlled substance. Any person who violates this subsection is guilty of a misdemeanor and upon conviction, may be confined for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

Sources: Laws, 1971, ch. 529, § 20, eff from and after passage (approved April 16, 1971).

Cross references: § 6831-74, this title.

§ 6831-74. Distribution to persons under age twenty-one—second and subsequent offenses.

Any person twenty-one (21) years of age or over who violates Section 20 [§ 6831-70] of this act by distributing a controlled substance heretofore defined in Schedule I or II of Sections 7 and 8 [§§ 6831-57 and 6831-58] of this act which is a narcotic drug to a person under twenty-one (21) years of age is punishable by the fine authorized by Section 20 [§ 6831-70] of this act and a term of imprisonment of up to twice that authorized by said Section 20 [§ 6831-70] or by both. Any person eighteen (18) years of age or over who violates said Section 20 [§ 6831-70] by distributing any other controlled substance listed in Schedules I, II, III, IV, and V, as set out in Sections 7, 8, 9, 10, and 11 [§§ 6831-57 through 6831-61] of this act, to a person under eighteen (18) years of age is punishable by the fine authorized by the said Section 20 [§ 6831-70], or by a term of imprisonment or confinement up to twice that authorized by said Section 20 [§ 6831-70], or both.

(a) Any person convicted of a second or subsequent offense under this act may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this act or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under paragraph (c) of Section 20 [§ 6831-70].

(d) However, regardless of the penalties provided heretofore for the violation of any section or portion of this act, the judge of the court of jurisdiction of any defendant may, in his discretion, suspend such penalty, penalties, or portions thereof, for any person charged with a first offense.

(e) A person convicted under this act or under any previous act for a violation of the law regarding controlled substances shall be eligible for parole just as in any other criminal conviction as provided by Section 4004-03, Mississippi Code of 1942.

(f) Any person who was convicted and/or who is still serving a sentence in the Mississippi State Penitentiary for a first offense under any act hereunder repealed may, upon the enactment of this act, petition the court of original jurisdiction for resentencing under the provisions of this act.

(g) Any person previously indicted under a prior act for violation of any law regarding controlled substances but not yet sentenced shall be sentenced under the provisions of this act.

(h) For the purposes of the sentencing provisions of the act, a first offense shall be deemed to be and include any offense, offenses, act or acts prohibited by this act, or any act herein repealed, committed prior to a first indictment under this act or under any act herein repealed.

Sources: Laws, 1971, ch. 521, § 24, eff from and after passage (approved April 16, 1971).

Cross Reference: § 6831-83, this title.

§ 6831-83. Pending proceedings.

(a) Prosecution for any violation of law occurring prior to the effective date of this act shall not be affected or abated by this act and the penalty for such violation shall be prescribed in accordance with Section 24(g) [§ 6831-74] of this act.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of this act are not affected by this act.

(c) All administrative proceedings pending under prior laws which are superseded by this act shall be continued and brought to a final determination in accord with the laws and rules in effect prior to the effective date of the act. Any substance controlled under prior law which is not listed within Schedules I through V as defined in Sections 7, 8, 9, 10 and 11 [§§ 6831-57 through 6831-61] of this act is automatically controlled without further proceedings and shall be listed in the appropriate schedule.

(d) The State Board of Pharmacy and State Board of Health shall initially permit persons to register who own or operate any establishment engaged in the manufacture, distribution or dispensing of any controlled substance prior to the effective date of this act and who are registered or licensed by the state.

(e) This act applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings and investigations which occur following its effective date.

Sources: Laws, 1971, ch. 521, § 33, eff from and after passage (approved April 16, 1971).

§ 6831-87. Severability

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sources: Laws, 1971, ch. 521, § 37, eff from and after passage (approved April 18, 1971).

§ 6831-88. Repeals

Sections 6831-01, 6831-02, 6831-03, 6831-04, 6831-05, 6831-06, 6831-07, 6831-08, 6831-09, 6831-10, 6831-11, 6844, 6845, 6845.5, 6846, 6849, 6850, 6852, 6853, 6854, 6855, 6858, 6860, 6863, 6864, 6865, 6866, 6867, 6868, and 6869 are hereby repealed.

Sources: Laws, 1971, ch. 521, § 38, eff from and after passage (approved April 18, 1971).

EXHIBIT "B"

Section 7. Section 6831-70, Mississippi Code of 1942, is amended to read as follows:

6831-70. (a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Any person who violates this subsection with respect to:

(1) A controlled substance classified in Schedule I or II, as set out in Sections 6831-57 and 6831-58, Mississippi Code of 1942, which is a narcotic drug is guilty of a felony and upon conviction may be imprisoned for not more than fifteen (15) years, or fined not more than Fifteen Thousand Dollars ($15,000.00), or both;

(2) Any other controlled substance classified in Schedules I, II or III, as set out in Sections 6831-57, 6831-58 and 6831-59, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than ten (10) years, or fined not more than Fifteen Thousand Dollars ($15,000.00), or both;

(3) A substance classified in Schedule IV, as set out in Section 6831-60, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than ten (10) years, or fined not more than Fifteen Thousand Dollars ($15,000.00), or both;

(4) A substance classified in Schedule V, as set out in Section 6831-61, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than five (5) years, or fined not more than Five Thousand Dollars ($5,000.00), or both.

(b) Except as authorized by this act, it is unlawful for any person to create, deliver, or possess with intent to deliver, a counterfeit substance.

Any person who violates this subsection with respect to:

(1) A counterfeit substance classified in the said Schedule I or II which is a narcotic drug is guilty of a felony and upon conviction may be imprisoned for not more than fifteen (15) years, or fined not more than Fifteen Thousand Dollars ($15,000.00), or both;

(2) Any other counterfeit substance classified in Schedules I, II or III as defined in Sections 6831-57, 6831-58 and 6831-59, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than ten (10) years, or fined not more than Fifteen Thousand Dollars ($15,000.00), or both;

(3) A counterfeit substance classified in Schedule IV as defined in Section 6831-60, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than ten (10) years, or fined not more than Fifteen Thousand Dollars ($15,000.00), or both;

(4) A counterfeit substance classified in Schedule V as defined in Section 6831-61, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than five (5) years, or fined not more than Five Thousand Dollars ($5,000.00), or both.

(c) Except as authorized by this act, it is unlawful for any person to sell, barter or transfer a controlled or counterfeit substance for money or for other consideration.

Any person who violates this subsection with respect to:

(1) A controlled substance classified in Schedule I or II, as set out in Sections 6831-57 and 6831-58, Mississippi Code of 1942, which is a narcotic drug, is guilty of

a felony and upon conviction may be imprisoned for not more than thirty (30) years, or fined not more than Thirty Thousand Dollars ($30,000.00), or both;

(2) Any other controlled substance classified in Schedules I, II or III, as set out in Sections 6831-57, 6831-58 and 6831-59, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than twenty (20) years, or fined not more than Thirty Thousand Dollars ($30,000.00), or both;

(3) A substance classified in Schedule IV, as set out in Section 6831-60, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than twenty (20) years, or fined not more than Thirty Thousand Dollars ($30,000.00), or both;

(4) A substance classified in Schedule V, as set out in Section 6831-61, Mississippi Code of 1942, is guilty of a felony and upon conviction may be imprisoned for not more than ten (10) years, or fined not more than Ten Thousand Dollars ($10,000.00), or both.

(d) It is unlawful for any person knowingly or intentionally to possess any controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this subsection with respect to:

(1) A controlled substance classified in Schedules I or II as set out in Sections 6831-57 and 6831-58, Mississippi Code of 1942, except marihuana, is guilty of a felony and upon conviction may be imprisoned for not more than three (3) years, or fined not more than Three Thousand Dollars ($3,000.00), or both;

(2) (a) One (1) ounce or less of marihuana, upon conviction may be confined for not more than one (1) year

in the county jail or fined not more than One Thousand Dollars ($1,000.00), or both.

(b) More than one (1) ounce of marihuana, upon conviction may be fined not more than One Thousand Dollars ($1,000.00), or confined in the county jail for not more than one (1) year, or both; or fined not more than Three Thousand Dollars ($3,000.00), or imprisoned in the state penitentiary for not more than three (3) years, or both.

(3) A controlled substance classified in Schedules III, IV or V as set out in Sections 6831-59, 6831-60 and 6831-61, Mississippi Code of 1942, upon conviction may be confined for not more than one (1) year, or fined not more than One Thousand Dollars ($1,000.00), or both.

(c) It is unlawful for a person who is not authorized by the State Board of Health, State Board of Pharmacy, or other lawful authority to possess paraphernalia to be used for the purpose of processing, delivering, packaging, taking or administering a controlled substance. Any person who violates this subsection is guilty of a misdemeanor and upon conviction may be confined for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00) or both.